No. 14,593

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

vs.

B. L. KENNEDY, FORD Q. ELVIDGE, HOWARD D. PORTER, and RICHARD TAITANO,
Appellees.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

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On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

This is an appeal from a final order and judgment of the District Court of Guam entered on the 31st day of August, 1954 dismissing the complaint, denying the plaintiffs' motion for summary judgment and entering summary judgment in favor of the defendants. Jurisdiction to hear this appeal is in this court by virtue of Section 1291 Title 28 U.S.C.A. This action arises under the Revenue Laws of the United States and seeks the construction of Chapter 8A Title 48 U.S.C.A.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

This case is one wherein the plaintiffs, herein appellants, are seeking the construction of a Statute of the United States, namely Chapter 8A of Title 48 U.S.C.A. commonly known as the "Organic Act of Guam".

Plaintiffs Wilson and White are United States citizens, who have been residents of the unincorporated territory of Guam for several years while employed by Brown-Pacific-Maxon, a joint-adventure performing construction work for the United States under contract with the Department of the Navy. Wilson and White are not employees of the United States. Plaintiffs Bogovich and Tintorri are citizens of the United States, residents of the unincorporated territory of Guam, who in partnership own and operate a prominent restaurant and cocktail lounge. In the operation of this partnership, they have employed numerous individuals.

The defendants are respectively B. L. Kennedy, from sometime in 1953 until a date subsequent to the commencement of this action an employee of the Government of Guam in the Department of Finance, titled under the Business Privilege Tax Provisions of Chapter XX of the Government Code of Guam, Commissioner of Revenue and Taxation; defendant Elvidge has, since the year 1953 to the present been the Governor of Guam; defendant Porter, for this same period, has been the Attorney General of the unincorporated territory of Guam; defendant Taitano

has, since the year 1952, to the present, been the Director of Finance of the Government of Guam.

Since the year 1951, officials of the Government of Guam have construed the Organic Act of Guam to contain in a one sentence section, the entire text of Title 26 U.S.C.A., insofar as such title refers to and concerns income taxes, which section further is claimed by such officials to create within Guam a counterpart tax structure and system, similar to the Bureau of Internal Revenue of the United States, with the right, power, and authority to apply, enforce and administer the provisions of Title 26 U.S.C.A. as a territorial tax for the benefit of the Government of Guam. These same officials have claimed to, and in actual practice do, interpret, alter, substitute words and make such alterations in the text of the Statute, claimed to exist locally, as in their discretion they from time to time deem advisable, necessary or expedient. A few interpretations, alterations and substitutions have been made by the publication of regulations. The vast majority, however, have been the oral opinions of various employees given from time to time to meet the exigencies then to be faced and, of course, no record ever is maintained.

Acting upon this contention of the various Government officials, the oral instructions of the Governor, the, it must be assumed, advice of the Attorney General, the Director of Finance, through his subordinates, charged by Statute with the duty of col-

lecting the territorial Business Privilege Tax proceeded to create a staff and organization, similar, it is claimed, to that of a Collector of Internal Revenue of the United States. All the authority and power of the Secretary of the Treasury, of the Commissioners of Internal Revenue and of a District Director of Internal Revenue were assumed and locally exercised, certain steps or functions being omitted, however. Thus, no Tax Court exists, no appellate procedure is found, no technical staff provided. The text of this claimed territorial tax law has never been published and cannot be found and further, any changes claimed to have been of necessity made in the text of Title 26 U.S.C.A. have never been published, thus rendering as a practical matter it extremely difficult if not impossible to use the United States Statute as a guide.

Nevertheless, these defendants and other officers and employees of Guam have proceeded to demand, collect, and receive taxes from citizens of Guam, to publish forms, to assess penalties, to attach, levy, seize funds and property, file Guam tax liens, and issue Warrants of Distraint, and institute suits both civil and criminal.

Plaintiffs Wilson and White, along with their fellow employees, and without their permission, had withheld from their pay various but substantial sums by their employer, Brown-Pacific-Maxon, upon the demand of the defendants and such sums were thereafter paid over to the defendants or to some of them. Such withholding continues to the present. Further,

the defendants continue to claim and demand additional sums and continued withholding.

Plaintiffs Bogovich and Tintorri have been coerced, under threats of penalties and other sanctions, to withhold from their various employees large sums of money and pay the same over to defendants.

Plaintiffs Wilson and White brought this action to recover monies illegally obtained and to have determined the existence of the alleged separate territorial tax, the authority, if any, of the defendants to collect such a tax, if any, and to enjoin the defendants from illegally exacting a tax and doing other illegal acts.

Plaintiffs Bogovich and Tintorri joined in this action, their claim involving common questions of law, seeking the same determination and relief sought by Wilson and White and to have the monies illegally coerced from them paid over to their employees, rightfully entitled thereto.

The defendants, appearing by the Attorney General and his staff, moved for dismissal on the grounds of lack of jurisdiction over the subject matter and for failure to state a claim, also for summary judgment.

Plaintiffs had served, pursuant to Rule 36, requests for admission of facts, upon each defendant, seeking to determine the text of the alleged territorial income tax, the nonexistence of any territorial legislation implementing the same, the lack of local statutory authority to permit enforcement, administration or collection of income tax by defendants, the lack of any delegation of authority by the Secretary

of the Treasury or the Commissioner of Internal Revenue, that defendants are not attempting to enforce a United States tax or collect a tax on behalf of the United States, and the existence or lack of appellate procedure provided by the United States for Federal taxpayers. These requests were in detail to permit, insofar as possible, either direct admission or denial by each defendant of the majority of the statements or for him to state that he personally could not answer that statement. Thus plaintiffs endeavored to clearly set forth the factual background and circumstance of the action. The defendants answered and objected to the majority of the requests; in fact defendant Kennedy's answer was not verified by him but by defendant Taitano.

Nothing was accomplished, however, since the District Court did not consider these requests for admission and apparently believes that the rule does not have to be followed in such an instance.

Upon hearing, the defendants' motion to dismiss the complaint was granted and thereafter the District Court of Guam entered summary judgment for the defendants. This appeal followed raising numerous points of error. However, since these claimed errors fall into several related categories it is believed that in the interest of clarity and convenience they should better be considered and discussed by category rather than a separate and disjointed discussion of each, error. This method has been adopted in this brief.

The questions presented herein basically are set forth as follows:

1. Whether the court was in error in dismissing the complaint, entering summary judgment for the defendants rather than the plaintiffs, after deciding issues of fact upon affidavits filed to support a motion.

2. Whether the court erred in entering summary judgment in favor of defendant Kennedy.

3. Did the court err in holding that no controverted question of fact existed.

4. Was the court in error in holding that all requests for admission were not as a matter of law admitted.

5. Did the court err in not considering admission of defendants' counsel in open court and in holding that the defendants have authority to collect income taxes, supporting this position by the authority of IT. 4046.

6. Were the defendants sued in their official capacities.

7. Did the court erroneously construe the Organic Act of Guam and the *Laguana* case.

8. Did the court err in holding that the income tax laws of the United States are territorial income tax laws subject to changes in nomenclature.

9. Did the court fail to see major constitutional questions in the case.

10. Did the court err in failing to comply with the Federal Rules of Civil Procedure and not requiring defendants to also comply.

STATUTES AND RULES INVOLVED.

Title 26 *U.S.C.A.*

Section 53.

Time and place for filing returns.

(b) To whom return made.

(1) Individuals. Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland.

(2) Corporations. Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the Collector at Baltimore, Maryland. 53 Stat. 28.

Section 62.

Rules and regulations.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter. 53 Stat. 32.

Section 272.

Procedure in general.

((a)(1) Petition to the Tax Court of the United States.) If in the case of any taxpayer, the Commissioner determines that there is a de-

ficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail.

Section 273.

Jeopardy assessments.

(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

Section 291.

Failure to file return.

(a) In case of any failure to make and file return required by this chapter, within the time prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax:

Section 1621.

Definitions. As used in this subchapter.

(a) Wages. The term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

. . . (8) . . . (B) for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the United States (other than Puerto Rico), if it is reasonable to believe that at least 80 per centum of the remuneration to be paid to the employee by such employer during the calendar year will be for such services, . . .

Section 3650.

Collection districts.

(a) Establishment and alteration. For the purpose of assessing, levying, and collecting the taxes provided by the internal revenue laws, the president may establish convenient collection districts, and may from time to time alter said districts.

(b) Number. The whole number of collection districts for the collection of internal revenue shall not exceed 65.

(c) Boundaries.

(1) Hawaii. The Territory of Hawaii shall constitute a district for the collection of the internal revenue of the United States, with a collector, whose office shall be at Honolulu, and deputy collectors at such other places in the several islands as the Secretary shall direct.

(2) Elsewhere. For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district. 53 Stat. 445.

Section 3670.

Property subject to lien.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

Section 3743.

Regulations.

It shall be the duty of the Commissioner, with the approval of the Secretary, to establish such regulations, not inconsistent with law, for the observance of revenue officers, respecting suits arising under the internal revenue laws in which the United States is a party, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States under such laws. 53 Stat. 460.

Section 3760.

Closing agreements.

(a) Authorization. The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in re-

spect of any internal revenue tax for any taxable period.

(b) Finality. If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded. 53 Stat. 462.

Section 3791.

Rules and regulations.

(a) Authorization.

(1) In general. Except as provided in section 1928 (a), Cotton Futures, section 2599, Marihuana, section 2559, Narcotics, section 3176, Liquor, and section 1805, Silver, the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

(2) In case of change in law. The Commissioner may make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations or rulings. The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect. 53 Stat. 467.

Section 3797.

Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

. . . (9) United States. The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

(10) State. The word "State" shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary. The term "Secretary" means the Secretary of the Treasury.

(12) Commissioner. The term "Commissioner" means the Commissioner of Internal Revenue.

(13) Collector. The term "collector" means collector of internal revenue.

Section 3900.

Appointment and salary.

There shall be in the Department of the Treasury a Commissioner of Internal Revenue, who

shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to basic compensation at the rate of $15,000 per annum. As amended Oct. 15, 1949, c. 695, § 5 (a), 63 Stat. 880.

Section 3901.

Powers and duties.

(a) Assessment and collection. The Commissioner, under the direction of the Secretary—

(1) General Superintendence. Shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue; and

(2) Regulations, forms, stamps, and dies. Shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; and shall provide hydrometers, and proper and sufficient adhesive stamps and stamps or dies for expressing and denoting the several stamp taxes, or, in the case of percentage taxes, the amount thereof; and alter and renew or replace such stamps from time to time, as occasion may require.

Section 3941.

Appointment.

(2) In General. The President, by and with the advice and consent of the Senate, shall appoint for each collection district a collector, who shall be a resident of the same.

(b) Consolidation of collection districts. When two or more collection districts are united by

the President, he may designate from among the existing officers of such districts one collector for the new district, or, at his discretion, he may make a new appointment of such officer for said district.

Section 4041.

Issue of instructions, regulations, and forms.

(a) In General. The President, by and with forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws; and he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

Title 28 *U.S.C.A.*

Section 1340.

Internal revenue; customs duties.

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

Section 1341.

Taxes by States.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Section 1343.

Civil rights.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Section 2201.

Creating of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

As amended May 24, 1949, c. 139, § 111, 63 Stat. 105.

Section 2202.

Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Title 48 *U.S.C.A.*

Section 1421b.

Bill of rights.

. . . (e) No person shall be deprived of life, liberty, or property without due process of law.

(f) Private property shall not be taken for public use without just compensation.

. . . (n) No discrimination shall be made in Guam against any person on account of race, language, or religion, nor shall the equal protection of the laws be denied. . . .

Section 1421c.

Certain laws continued in force; modification or repeal of laws; applicability of Acts of Congress.

. . . (b) Except as otherwise provided in this chapter, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to "possessions".

Section 1421h.

Duties and taxes to constitute fund for benefit of Guam.

All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets. Aug. 1, 1950, c. 512, § 30, 64 Stat. 392.

Section 1421i.

Applicability of Federal income tax laws.

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam. Aug. 1, 1950, c. 512, § 31, 64 Stat. 392.

Section 1422c.

Executive agencies and instrumentalities—Appointment of heads; preferences in appointments and promotions; educational and vocational training; establishment of merit system.

(a) The Governor shall, except as otherwise provided in this chapter or the laws of Guam, appoint, by and with the advice and consent of

the legislature, all heads of executive agencies and instrumentalities. In making appointments and promotions, preference shall be given to qualified persons of Guamanian ancestry. With a view to insuring the fullest participation by Guamanians in the government of Guam, opportunities for higher education and in-service training facilities shall be provided to qualified persons of Guamanian ancestry. The legislature shall establish a merit system and, as far as practicable, appointments and promotions shall be made in accordance with such merit system.

Appointment and removal of officers; powers and duties of officer.

(b) The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law.

Reorganization.

(c) The Governor shall, from time to time, examine the organization of the executive branch of the government of Guam, and shall determine and carry out such changes therein as are necessary to promote effective management and to execute faithfully the purposes of this chapter and the laws of Guam.

Continuation in office of incumbents.

(d) All persons holding office in Guam on August 1, 1950 may, except as otherwise provided in this chapter, continue to hold their respective

offices until their successors are appointed and qualified.

Title XX Chapter 6

Business Privilege Tax Laws

Section 19500.

Definitions . . .

.16 "Tax Commissioner" shall mean and include the person performing the duties of Commissioner of Revenue and Taxation for the government of Guam and who is charged with the administration and enforcement of the provisions of this act.

Section 19501.

Administration. The following provisions shall govern the administration of this entire Chapter and shall apply to all taxes levied hereunder.

.01. Tax District. The territory of Guam shall comprise one taxing district only and no subdivision thereof shall be made for the purpose of this chapter.

.02. Tax Commissioner. The Commissioner of Revenue and Taxation of the government of Guam (herein known as the Tax Commissioner) shall have the following duties, powers and authority:

.0201. Subordinates. With the approval of the Director of Finance, to designate from among the employees in his division such deputy collectors and internal revenue agents as may be required; provided, however, that the hiring and removal of all such employees shall be done in accordance with the personnel laws and regulations.

.0202. Assessment. He shall make all assessments of taxes levied by this Chapter.

.0203. Collection. He shall be responsible for the acts of his assistant, the Tax Collector, the deputy tax collector and the internal revenue agents, and for the enforcement and collection of all taxes imposed by this Chapter.

.0204. Construction of Revenue Laws. He shall construe the tax and revenue law, the administration of which are within the scope of his official duties, whenever requested by any officer acting under law, or by any interested person, provided that the Attorney General's Office shall give him such aid and assistance as he may require.

. . . .0207. Rules and Regulations. With approval of the Director of Finance he shall make such rules and regulations as he may deem proper within the scope of the law to effectually carry out the purpose of this Chapter, subject to the approval of the Governor of Guam.

Prentice-Hall 1951. 76,213.

I.T. 4046—Guam held to be a possession of the United States for Federal Income Tax purposes. See also 16,718).—

A domestic corporation doing business in Guam which satisfies the conditions set forth in section 251(a) of the Internal Revenue Code is exempt from United States income tax with respect to its income derived from Guam but is required to file returns and pay income tax to the government of Guam by reason of the dual system of taxation created by the Organic Act of Guam (64 Stat. 384; I.R.B. 1950-17, 20).

Advice is requested whether the taxable status of a domestic corporation doing business in Guam which satisfied the conditions set forth in section 251(a) of the Internal Revenue Code is affected by the enactment of the Organic Act of Guam (64 Stat. 384; I.R.B. 1950-17, 20), approved August 1, 1950.

Under section 3 of the Organic Act of Guam, Guam is declared to be "an unincorporated territory" of the United States with the capital and seat of government located at the city of Agana. It is further provided in that section that the government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct. Section 31 of the Act, which was placed in operation as of January 1, 1951, by Executive Order 10211 (I.R.B. 1951-4, 41), reads as follows:

Sec. 31. The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

Section 30 of the Act provides in part that all Federal income taxes derived from Guam shall be covered into the treasury of Guam and held in account for the government of Guam and shall be expended for the benefit and government of Guam in accordance with the annual budgets.

Under section 251(a) of the Internal Revenue Code, a domestic corporation which satisfies the

conditions stated therein is taxable only with respect to income from sources within the United States. Those conditions are in substance that (1) 80 percent or more of the corporation's gross income was derived from sources within a possession of the United States, and (2) 50 percent or more of its gross income was derived from the active conduct of a trade or business within a possession of the United States.

The island of Guam was ceded to the United States by Spain in accordance with Article II of the Treaty of Peace between the United States and Spain (30 Stat. 1754), signed at Paris on December 10, 1898, and proclaimed April 11, 1899. Guam has been a possession of this country ever since its acquisition. Although it is declared to be an "unincorporated territory" by section 3 of the Organic Act of Guam, it has the same legal status as the Virgin Islands and as that of Puerto Rico prior to enactment of the Revenue Act of 1950, and such status is not similar to that of Alaska and Hawaii.

Section 251(d) of the Internal Revenue Code, as amended by section 221(a) of the Revenue Act of 1950, provides that, as used in section 251 of the Code, the term "possession of the United States" does not include the Virgin Islands of the United States and that such term, when used with respect to citizens of the United States, does not include Puerto Rico. Guam is not mentioned in that section of the Code. However, section 29.251-4 of Regulations 111 provides in part that the term "possession of the United States", as used in sections 251 and 252 of the Code, includes Guam but does not include the Virgin Islands.

Section 3797(a)(9) of the Code provides that the term "United States" when used in a geographical sense, includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Inasmuch as Guam is not excepted from the provisions of Section 251 of the Code, the Bureau is of the opinion that it should be considered a possession of the United States, for Federal income tax purposes, regardless of its classification as an unincorporated territory by the Organic Act of Guam. It follows, therefore, that a domestic corporation which satisfies the conditions set forth in section 251(a) of the Code is taxable, for Federal income tax purposes, only with respect to income derived from sources within the United States.

The effect of section 31 of the Organic Act of Guam is to set up a separate income tax system for Guam which is a duplicate of the Federal income tax system. That section is substantially the same as a proviso contained in the Naval Appropriations Act of 1921 (42 Stat. 122), relating to the Virgin Islands, which reads as follows:

Provided further, that the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

I.T.2946(C.B.XIV-2, 109 (1935)) holds in part that the United States and the Virgin Islands are separate and distinct taxing jurisdictions al-

though their income tax laws arise from an identical statute applicable to each. It is stated in that ruling that it will be necessary, in some sections of the law (Revenue Act of 1934), to substitute the words "Virgin Islands" for the words "United States" in order to give the law proper effect in those islands. It is believed that the same principles are applicable to Guam in view of the above-mentioned provisions of the Organic Act of Guam.

Accordingly, it is held that a domestic corporation doing business in Guam which satisfies the conditions set forth in section 251(a) of the Internal Revenue Code is exempt from United States income tax with respect to its income derived from Guam but is required to file returns and pay income tax to the government of Guam by reason of the dual system of taxation created by the Organic Act of Guam. (I.T. 4046; 1951-6-13559.)

Federal Rules of Civil Procedure.

Rule 36.

Admission of Facts and of Genuineness of Documents.

(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained.

Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. As amended Dec. 27, 1946, effective March 19, 1948.

(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Rule 56.

Summary Judgment.

. . . (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948. . . .

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

SUMMARY OF THE ARGUMENT.

The appellants contend that the court fell into error when it dismissed the complaint, failed to enter Sum-

mary Judgment for the plaintiff and entered Summary Judgment for defendants, having decided issues of fact upon affidavits, that in effect the court decided these questions before it upon the premise that it is a desirable result, therefore, it must be reached and it is my duty to do so. That the rules, canons of construction and the text of the statutes are guides not binding rules. That despite the clear command of the rules the court entered the Summary Judgment for defendant Kennedy. Appellants contend that it is error and reversible to rule contrary to the rule in an important and basic matter.

Further, that the court was in error when it held as a matter of law that no controverted question of fact existed. All cases which appellants have located hold that a single controverted question of fact precludes the entry of Summary Judgment.

The court erroneously failed to hold, as a matter of law, that all requests for admission of facts requested of defendants were for the purpose of this action admitted due to the failure of defendants to comply either with the letter or spirit of the rule. Of especial significance was the fact that the reply and answer of defendant Kennedy was made for him by defendant Taitano, a clear violation.

The court erred in disregarding the admission of counsel for defendant, made in open court, that no local legislation exists authorizing any department or agency of the Government of Guam to collect an income tax or in fact any official to do so. That the al-

leged collection office had been set up upon the verbal instruction of the Governor. Further, that neither the legislature nor anyone else had created any formal procedures, tax court or avenue of appeal from the rulings of the Commissioner of Revenue and Taxation.

The court buttressed its position upon the Provisions of I.T.4046 issued by the Commissioner of Internal Revenue of the United States in 1951. This is indeed a weak reed to lean upon for numerous reasons. An I.T. is merely an office memorandum or opinion issued to guide the employees of the United States Internal Revenue Bureau in their work. It is not binding upon anyone, even the Bureau itself. It is the opinion of some attorney as to what he thinks the law means. In this case it purports to construe the text of Chapter 8A of title 48 U.S.C.A. This is clearly beyond the powers of any one in the Bureau of Internal Revenue. By statute the Commissioner of Internal Revenue and the Secretary of the Treasury of the United States are authorized solely to promulgate rulings and other instructions with respect to statutes that they are charged with enforcing, but such must be consistent with and not contrary or beyond the scope of the statute and specifically cannot add to, alter, amend or delete the text of the statute. To do otherwise is to legislate and Congress, by the provisions of the Constitution can neither delegate the legislative function to any executive agency or the courts. If the text of I.T. 4046 violates that restriction, it is void. Appellants hold that it does and is

void. If the Commissioner of Internal Revenue of the United States has not the duty to enforce the alleged territorial income tax claimed to be contained in Title 48 U.S.C.A. Chapter 8A then he is without lawful authority to interpret it or to delegate any authority in connection therewith. If the Commissioner of Internal Revenue of the United States has the duty to enforce the income tax laws within Guam, his attempted delegation of this authority and power is illegal and void. Consequently, appellants claim that I.T. 4046 on either ground is void and illegal and constitutes an unlawful attempt to usurp the legislative powers of the Congress and thereby amend an act of Congress by executive action. That the entire system of taxation thereby illegally constructed contrary to the Constitution and Laws of the United States though supported by opinions of the District Court of Guam and the policies of the executive branch of the Government must fall. The plain, clear meaning of a statute cannot be amended either by judicial or executive legislation, policy, needs or desires.

That the court erred and held contrary to the established rule as laid down by the Supreme Court and as expressed by the Congress that the defendants were sued in their official capacities. The pleadings are plain, and clear. These defendants were sued as individuals for acts without warrant in law and in excess of any lawful authority vested in them by virtue of their office. They were for purposes of identification and to delineate the bounds of their lawful au-

thority identified by showing in the complaint the offices which each defendant lawfully and legitimately holds. These defendants were sued in their individual capacity and it is against their illegal, void and personal acts in excess of any authority of their lawful office that the relief herein sought was demanded and the Judgment sought was against these defendants as individuals.

The court erred in its construction of the Organic Act of Guam. Appellants contend that the text of the Organic Act at least with respect to taxation is clear and unambiguous and therefore is not such as requires resort to the canons of statutory construction. That it clearly makes provision for the tax structure, who is to administer it and attempts to dispose of the taxes thereby collected. That this system is complete and requires no construction. That the Act says A. The Income Tax Laws of the United States are likewise in force in Guam. The Rule of Reason it would seem then at once requires one to turn to the text of the United States Income Tax Laws to see what they say—not to the desires, wishes or policies of any executive bureau, department or even Cabinet member. A logical question next arises: Do these laws provide for a system of collection, the necessary procedures, a full appellate procedure and officers duly authorized to administer these laws thereby? It is believed that they do and that that officer is the Commissioner of Internal Revenue of the United States. Is this system complete? The courts of the United States have so frequently held it to be that

no citation of authorities is necessary. Where then is there room, need or in fact authority to construe this statute? It is clear, plain and complete and forms part of the integrated nation-wide system of taxation declared by the Supreme Court to be the intent of the Congress and the requirement of the Constitution. Our next question logically is, what is done with the taxes so collected? Clearly the law requires that as with all taxes collected, it is to be paid into the United States Treasury. There the tax collector's duties and responsibilities end. The fact that another section of the Organic Act directs that these funds so collected will then be transmitted to the Treasury of Guam is not part of the tax law and has no bearing on the administration of a tax law or the powers, authorities and duties of a collector. Is not this proviso herein discussed an act of appropriation of monies? That is not a tax matter and appellants conclude that this fact in no way can be determinative of the existence or non-existence of a tax or show any purpose or intent of Congress as to the creation of a tax or of its administration.

In construing the Laguana case, the District Court of Guam erred in holding that the appellate court ratified every word which the District Court of Guam used to embellish its decision. The rules for the interpretation of judgments and the construction of judgments would seem to hold that all matters in a judgment not necessary to the judgment are dicta and while often fine expressions of judicial reasoning, are to be disregarded in construing and applying a judg-

ment. In the Laguana case, what were the essential points? All others are dicta. The holding of the District Court of Guam was that plaintiff therein failed to state a claim upon which relief could be granted. Any statements in the decision of that case not necessary to that holding are dicta. This decision was upon the pleadings and admissions in that case, nothing more. Upon the facts of that case, no others in this opinion are binding. This case is res judicata upon only Laguana, no other. Laguana stipulated that Ansell was the duly constituted officer to collect and receive taxes. The sole other question of moment being the application of Section 251 to Laguana. The judgment was based upon the pleadings directed to but one question. Did Laguana state a claim? Nothing could be considered but the allegation of fact in the complaint and the admissions and allegations of the answer. If they were inadequate, they failed and dismissal was proper. But can this case do more than hold that Laguana failed? Appellants contend not and that this case cannot be authority for any other point. This case cannot be ruling under different factual situations and claims.

The court was in error in holding that the Income Tax Laws of the United States are also territorial tax laws subject to changes in nomenclature. The court closed its mind to a cardinal principle of all tax legislation, namely that taxes shall not be imposed by implication. Taxes shall not be imposed by construction either executive or judicial. That to permit either the executive or in fact the courts to

amend, add to, delete, substitute or alter is to permit legislation by the courts and the executive. This appellants contend is beyond their powers and is contrary to all constitutional standards and safeguards. It violates all canons for the construction of statutes. Wherein do we find such a delegation of legislative power and if found, is it not void?

The court failed to see in this action several important and basic Constitutional questions, among them being the usurping of the legislative powers or its illegal delegation. That the appellants are without an adequate remedy at law. The question of the deprivation of property without due process of law, the denial of the equal protection of the law as well as numerous other Constitutional questions raised by the pleadings were not noticed by the court.

The court erred in disregarding the Federal Rules of Civil Procedure, the provisions of which are mandatory and in failing to require defendants to do likewise. Rule 36 is clear and is mandatory. The court completely disregarded both the spirit and letter of the Rule and permitted the defendants to do likewise.

Therefore, appellants contend that the District Court of Guam should be reversed and this action be remanded for further proceedings and with instructions to enter Summary Judgment for appellants.

ARGUMENT.

Appellants considering the proceedings heretofore had in this action and after reviewing the events

which have transpired find themselves confronted with what to appellants seem innumerable grave errors as well as many other errors, the importance of which, except in the aggregate, is considered minor.

In attempting to briefly point out what fundamental errors appellants believe warrant reversal, they find themselves confronted with the task of condensing these matters into as few words as possible, and yet retaining intelligence in the brief. Accordingly, errors as originally listed will, whenever falling into a related category, be treated together. Appellants do endeavor to present a brief rather than a treatise. The chief difficulty with this problem is that every attempt to place the actual factual situation and the issues actually involved in the record has proved abortive and our major problem has proved to be the fog of procedures.

I.

THE COURT ERRED IN DISMISSING THE COMPLAINT, AND THEREAFTER ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS RATHER THAN FOR PLAINTIFFS, HAVING DECIDED QUESTIONS OF FACT UPON AFFIDAVITS AT A HEARING UPON A MOTION RATHER THAN UPON TESTIMONY AND EVIDENCE AND WITHOUT CONSIDERING PLAINTIFFS' CITATIONS OF AUTHORITIES (Points 1, 2, 3, 5, 6).

The court was in error when it dismissed the complaint. It would appear to appellants, and they believe that any one perusing the statements made by the court both at the hearing upon the motions and in

the opinion that the mind of the court was completely closed to any concept other than the one expounded by the learned court, to wit:

There is a territorial income tax, that statutory authority is not necessary since by implication such authority as may be required can be assumed, that the Federal Rules of Civil Procedure when attempted to be used complicate rather than clarify the issues, that the matters sought to be presented to the court and various issues raised are of no moment since the entire problem has heretofore been conclusively determined. Therefore, appellants by instituting this action seek to raise issues which are capricious and without merit. That basically the court is of the opinion that the basic fact is the Government of Guam is in need of the monies and that in any event and regardless they are going to have them. It is appellants' belief, with this concept uppermost in mind, the court was led to fall into numerous fundamental errors and disregarded the issues raised by the pleadings and failed to see various basic errors in the proceedings as they occurred. T.R. 71, 72, 85, 91, 100, 105, 110.

Appellants believe that the court erred in dismissing the complaint. The defendants moved to dismiss the complaint on two grounds; (1) failure to state a claim upon which relief can be granted, (2) because the court does not have jurisdiction over the subject matter. T.R. 14.

Their second ground is, we believe, without merit and is answered simply. This action arises under a

statute of the United States and involves the construction and application of the Internal Revenue Code of the United States. Clearly the court does have jurisdiction over the subject matter of the action.

Ground one of defendants' motion, appellants assert, is equally without merit since it is a cardinal rule that upon a motion to dismiss all allegations contained in the complaint must be accepted as true. As recently as the 31st day of January, 1955 the Supreme Court reaffirmed this rule, saying ". . . the allegations of the complaint, on a motion to dismiss, must of course be taken as true . . ." *United States v. Shubert,* U.S. 99 L.Ed. (Advance P. 213.) See also *United States v. International Boxing Club,* U.S. 99 L.Ed. (Advance P. 221.) Therefore to dismiss the complaint upon the motion was improper unless no allegation in the complaint, all being accepted as true, stated a claim upon which relief could be granted. The complaint alleged the taxes to be illegal, the demands of defendants also illegal, T.R. 4, 5. That the sums collected have been converted by defendants, T.R. 7. That defendants have usurped the authorities of the Commissioner of Internal Revenue of the United States, T.R. 8, and have altered and amended the Internal Revenue Code of the United States. That defendants have no statutory authority, T.R. 9. That plaintiffs are deprived of their property without due process of law, T.R. 10. Surely with these allegations construed as true for the purpose of the motion to dismiss, did not the complaint set forth a claim which precluded the court from dismissal. Appellants claim

that it was error to dismiss this complaint. See also *United States v. Mixon,* 12 F.R.D. 122, "When affidavits are relied upon to demonstrate that an issue of fact formally raised by the pleadings is not a 'genuine' issue, there must be compliance with Rule 56(e). The court may enter summary judgment only upon a showing by competent evidence, admissible at trial, that a trial would necessarily result in a directed verdict for the moving party. If such showing is attempted to be made by affidavit, it must clearly negate the allegations of the complaint. To put it in the affirmative, there must be convincing proof that no factual issues remain for determination to resolve the question raised. *Dewey v. Clark,* 86 U.S. App.D.C. 137, 180 F.2d 766, 772; *Arnstein v. Porter,* 2 Cir., 154 F.2d 464, 470." *Wittlin v. Giacalone,* 154 F.2d 20, "We are impelled to that conclusion because it is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers. Indeed, Professor Moore says in his work on Federal Practice Under the New Federal Rules: 'Even if the pleading of the party opposing the motion is defective and does not state a sufficient claim or defense, the motion will be denied, if the opposing papers show a genuine issue of fact.' . . ." *Smart v. United States,* 111 F.Supp. 907, "For the purpose of this motion the allegations of the

complaint must be taken as true and unless it appears with absolute certainty that the plaintiff is not entitled to relief upon any theory, the request for summary judgment should be denied." *Kingan & Co. v. Smith,* 16 F.Supp. 549, "It is the duty of the court to accept as true the allegations of the bill of complaint for the purpose of considering the motion to dismiss."

Having dismissed the complaint, how was it possible under any system of logic for the court thereafter or even coincident with the dismissal to enter Summary Judgment? Once the complaint was dismissed, there was nothing before the court; the court had nothing upon which to act.

However, in any event, did the court comply with the provisions of Rule 56, p. 27 ante? Did the court consider the requests for admission? Did it consider the form and sufficiency of the affidavits in support of the motion? Did the court consider whether or not there were in fact material questions of fact remaining in the case?

The complaint alleged that defendant Taitano had no legal authority to collect an income tax. Defendant Taitano in his affidavit claims he has such authority, T.R. 16. That these duties have been assigned to his office upon his information and belief, T.R. 17.

The complaint alleges that the Department of Finance has no duties or authority with respect to collection of income taxes. Defendant Elvidge claims that such Department has such authority and duty, T.R. 15.

The complaint alleges that the defendant Kennedy possessed no authority or power to collect income taxes. Defendant Taitano claimed he has. The complaint alleges illegal threats of action both civil and criminal. Defendants did not meet this allegation. The complaint alleges that defendants claim the right to administer, interpret, substitute, delete, amend and add to the text of Title 26 U.S.C.A. Defendants have not met these allegations. The complaint alleges a complete lack of statutory authority. Defendants did not meet this allegation. The complaint alleges the deprivation of property without due process of law. This again is not met. These and other allegations appellants contend are issues of fact, not questions of law. Appellants contend that the facts must be determined; then and then only should they be interpreted by the court and the conclusions of law therefrom derived. How did the court arrive at its determination of the facts? Or rather at the conclusion that no material issue of fact remained upon which the action should be tried!

The court accepted as conclusive of the truth of the facts the affidavits of the defendants, T.R. p. 90 ". . . and those officials have made affidavits that they are the people who normally collect the taxes", T.R. p. 91, "According to the affidavits, the Government of Guam has set up a tax collection system and that tax collection system extends from the Governor to the Director of Finance through the Collector of Internal Revenue . . ."

In fact, appellants contend that rather than conclusively showing that no material question of fact remains, the affidavits conclusively show that there are several material issues which the court should review evidence upon.

The court after discussing several immaterial matters in and at the hearing, and in its opinions and stating that no statute exists, held that defendants as a matter of law are entitled to Summary Judgment. Appellants claim this is error.

The court precluded plaintiffs from presenting evidence to show the illegal acts of the defendants, evidence to show that defendants have no authority, that defendants have added to, deleted, altered, omitted and in general re-written the text of the Internal Revenue Code of the United States to suit their desires, convenience and fancy.

The court did not consider the requests for admission, the objection thereto and the question as to whether or not as a matter of law the requests were not in fact admitted.

Requests under the rule are, appellants believe, the same as testimony in the case and are to be so considered.

Therefore, appellants contend that the court erred and should be reversed.

II.

THE COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT KENNEDY (Point 4).

Defendant Kennedy was not entitled to have Summary Judgment entered in his favor for various reasons. First, it has been held in many cases that failure to comply with the provisions of Rule 56 will warrant and support the entry of Summary Judgment against such party. Defendant Kennedy did not answer or deny—in fact, his purported answer was sworn to by defendant Taitano, T.R. p. 70. Thus defendant Kennedy is in the legal position of having admitted for the purposes of this action all the requests for admission of facts.

III.

THE COURT WAS IN ERROR IN HOLDING THAT NO CONTROVERTED QUESTION OF FACT EXISTED (Point 7).

A controverted question of fact it must, appellants contend, be considered any fact which is material to the issues presented which is not admitted by the litigants and which is of sufficient materiality to the issues that their proper determination hinges or is affected by its resolution.

In this action, appellants claim that numerous questions of fact remain unresolved and that without such resolution it is error to enter judgment.

Basic as it may appear, appellants assert that the most fundamental question to be solved is what is the text of the alleged income tax law, which defendants

claim to be administering and enforcing. Patently and we conclude based upon this entire record, it cannot be the text of Title 26 U.S.C.A. It has been admitted by the defendants, alluded to by the court, and alleged by the plaintiffs without denial that there have been unpublished changes in the text of the Federal Statute to make it conform to the local situation or requirements of the defendants. Plaintiffs have sought without avail to obtain the text of this statute as thus amended. This court cannot obtain the text. It does not exist. Is not the simple text of the statute in question, not its meaning or construction, a fact and a very material fact which must first be ascertained before anyone can intelligently discuss the issues herein raised. Appellants ask this court if the first step in construing, applying and discussing a statute is not to find out what is its text. This action in fact is the case of the unknown law.

It is the case of the Income Tax Laws of the United States as amended but no one knows what amendments have been made or if he knows he will not tell. Is not the very text of the alleged statute in question our first controverted fact. We claim it has not been changed one iota. The defendants claim it has, but will not tell how.

Appellants claim that defendants have no statutory authority authorizing their actions, either federal or territorial. Defendants claim that they have both. Appellants claim that as a fact defendants Kennedy and Taitano have never been duly authorized in any manner to collect, enforce or administer any income

tax. All defendants claim that they have. Appellants claim that defendants as individuals have coerced monies from appellants and converted the same. This defendants deny.

That defendants have coerced the employers of plaintiffs Wilson and White into violations of the terms of Section 1621 *et seq.* and have also coerced plaintiffs Bogovich and Tintorri to violate the same section. This fact has not been resolved.

That defendants have usurped the duties, responsibilities and authority of the Commissioner of Internal Revenue of the United States, have usurped the legislative authority of the Congress and have changed, altered, taken from and added to the statutes of the United States. These issues are material and unresolved.

That the plaintiffs have no adequate means of seeking relief, that the acts of the defendants have deprived plaintiffs of their property without due process of law. These facts have not been determined.

Viewing these, to appellants, vital questions of fact, can it be held either that the District Court of Guam had before it sufficient facts upon which to base a judgment? Can it be held that there was no genuine issue as to any material fact? Can it be determined as a matter of law what the text of a statute or other document, the acts of defendants and their legality, the authorities of the defendants and their source, the violation of mandatory sections of a Federal Statute, the existence of due process of law without the fac-

tual situation, all based upon the court's taking judicial notice of two cases, one involving a jurisdictional point as to the party defendant, the other decided solely upon the question of whether a claim was set forth coupled with two self-serving affidavits of defendants which are replete with hearsay? Appellants contend that a simple reading of the complaint and the affidavits in opposition clearly show the existence of numerous genuine controverted questions of fact and that the court erred when it held to the contrary.

Appellants contend that a fact is an event or happening, circumstances from which conclusions of law should be derived. Can they be derived until and unless the fact itself is determined? We believe not. Therefore, our belief is that the court was in error. Is not a fact that thing the existence of which we must establish before we can draw valid conclusions? This we believe.

IV.

THE COURT ERRED IN NOT FINDING ALL THE REQUESTS FOR ADMISSIONS OF FACT IN THE PRESENT ACTION TO BE PURSUANT TO RULE 36 ADMITTED AS A MATTER OF LAW (Point 8).

Appellants on the 19th day of July, 1954 served upon the defendants identical requests for the admission of facts pursuant to the provisions of Rule 36. These requests of necessity were long, due both to the complexity, or rather the existing confusion,

of the matter and for the practical matter that short, brief, simple and uninvolved statements are easier to answer either yes or no; or to explain if necessary. A further practical matter of course is the fact that it is much easier to equivocate and evade meeting the point in a long, involved and rambling statement than in a short, terse one covering but one fact. These requests for admission fall into, appellants believe, clear-cut headings. Namely, the claims of defendants, the text of the alleged territorial income tax, the existence of directives, the delegation to defendants of authority, the truth of certain acts of the defendants. Appellants contend that all facts sought are relevant to this action and are within the personal knowledge of some or all of the defendants and that all defendants could with little effort determine their truth, falsity or raise valid objections to each statement.

Appellants contend that the text of the alleged territorial income tax law is both vitally relevant and material but that it is a fact. If the text of Title 26 U.S.C.A. has not been changed or altered, it is simple to say so. Since the territorial tax alleged to be in existence has never been published, this it would seem is a fact peculiarly within the knowledge of the defendants. Appellants contend that substantially all of the requests for admissions are within the provisions of Rule 36 relevant matters of fact and proper material to be included in such request.

Appellants contend that the defendants violated the intent of the Rules in two major items. First defendants did not seek a ruling on their objections to the

requests, and secondly the form of their objections is such as to render it as a practical matter impossible to match up their various objections with the statements to which they refer.

Appellants contend that this response is so at variance with the letter and the spirit of the rules as to vitiate these responses or objections and to amount to an admission in law of the truth of all facts set forth in the requests.

Appellants contend that the District Court of Guam violated the rule and was in error in not passing upon each requested statement of fact, giving its ruling and if, as to any statement of fact, an admission should properly be made directing the defendants to so admit.

The appellants were by this violation of the rules precluded from having in the records of this action certain admissions of fact which are material to the issues herein sought to be determined and in view of the provision that such matters so admitted will for the purposes of the instant case be considered as if testified to in court and have the same weight as other testimony, the appellants have been deprived of a substantial right, the purpose of the rules has been subverted and the court thus erroneously precluded competent evidence from being considered.

Appellants construe the method used by defendants in objecting to the requests for admission was calculated to defeat the purpose and intent of the rule and cannot fail to agree that it succeeded.

Appellants contend that certain of the objections made by defendants are patently without merit and that as a matter of law those statements stand admitted. Into this category appellants claim fall the following objections: T.R. p. 60, 1. (a) "Admissions as to whether certain authority has been delegated such as Items 47, 58, 57, 58, 59, 60, 61, 62, 103. (d) Admissions as to whether "interpretations" have been made of the law, such as Items 26, 27, 28, 29. (e) Such miscellaneous admissions as whether the Government of Guam has taken certain official actions (Items 7, 91); whether the taxpayer has "appellate or other rights" (Item 92); whether a "technical staff" exists (Item 93); whether a tax court exists and what is its jurisdiction (Items 81, 82); as to the function of the Commissioner of Internal Revenue (Item 80); whether Guam is in a collection district (Item 76); whether the Secretary of the Treasury has authority to delegate (Item 104); whether defendants acted through "agents and servants" (Items 24, 25); whether defendants "personally * * * accepted payments" (Items 24, 25). With respect to a statement the truth of which should be admitted in part, Rule 36 provides that the party shall specify so much as is true and deny or object to the remainder. Into this category fall the following objectives: T.R. p. 60, 1. (a) "Admissions as to whether or not certain legislation exists, and if it does exist, what it consists of or does not consist of, such as items 1, 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 30, 31, 32, 33, 53, 64, 65, 83, 84, 85, 88, 94, 95,

96, 99, 100, 101, 102, 107." Appellants believe that it is neither necessary nor desirable to go into a complete analysis of the evasive and improper objections in this action, it being sufficient to point out their existence and not burden this court with a needless discourse.

Appellants believe that substantially all, if in fact not all, of the requests for admissions are relevant, material and proper for the proper determination of the issues in this case and that the court erred in not requiring defendants to either answer, deny, in whole or in part, and with particularity as provided by the rule and with respect to the remainder to object to each on all proper grounds in numerical order. It is as improper so appellants claim to permit such a jumbled objection as to permit the joining of numerous unrelated claims for relief in a one paragraph complaint.

Appellants contend that the court was in error in not striking or disregarding the objection to the admission and holding that the same had been as a matter of law answered in the affirmative, particularly Nos. 1-9, 11-32, 37, 44-48, 57-60, 67-70, 74, 76, 77, 79-81, 84-89, 91-94, 96, 100-103, 105, 106, 108, 109.

Appellants ask one question, "Why are the defendants unwilling to make known what they claim is the text of the Income Tax Law they claim to be administering; why refuse to make public any changes they have claimed to have made; why do they hide their alleged source of authority; why are defend-

ants unwilling to make known what they profess to claim is a public law?" Can it be that defendants themselves do not know what the facts are and cannot produce the text of their alleged law, their alleged authorities? It has long been a rule that he who is silent when he should speak dare not.

Anna M. Fountain v. Paul Filson, 93 L.Ed. 971.

"Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her. The judgment of the Court of Appeals is, therefore, reversed and the cause remanded to the District Court for further proceedings in accordance with the opinion of the Court of Appeals as here modified."

Durasteel Co. v. Great Lakes Steel Corp., 205 F.2d 438.

"A summary judgment should not be entered unless it clearly appears that there is no genuine issue as to a material fact. Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C.A.; Dulansky v. Iowa-Illinois Gas & Electric Co., 8 Cir., 191 F.2d 881; Traylor v. Black, Sivalls & Bry-

son, Inc., 8 Cir., 189 F.2d 213; Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967."

Parke, Davis & Co. v. American Cyanide Co., 207 F.2d 571.

"The courts are reluctant to decide important issues by summary judgment because of the lack of a record adequate to explain the issues of fact and law, Estepp v. Norfolk & Western Ry. Co., 6 Cir. 192 F.2d 889. But here the issues are clarified by extensive interrogatories filed by both parties and answered fully. Also appellant agrees that there are no issues of fact involved in the specific grounds stated in the motion for summary judgment. Since the action is for infringement the validity of the patent is not involved but its scope is sharply in issue."

Shawmut, Inc. v. American Viscose Corp., 12 F.R.D. 488.

" * * * (7) It is objected also that many of the requests call upon the defendants to admit controversial issues and that they seek to elicit opinions. A quotation from the opinion of Judge Ridge in Knowlton v. Atchison, T. & S. F. Ry. Co., D.C., 11 F.R.D. 62, 65, is appropriate: 'The term "otherwise improper" contained in Rule 36(a) is a broad one, but, notwithstanding that fact, its application is circumscribed by being addressed "to the sound discretion of the district courts." Moore's Federal Practice, 2d ed. Vol. 3, 2722. It was not intended thereby to authorize or permit the making, and obtaining, of rulings before trial on every objection that may be leveled

at requests for admissions. Said provision was inserted in Rule 36(a) so that protective orders, such as are contemplated in Rule 30(b), might be made to the end that "absurdly onerous", unfair and burdensome requests or tactics, might not pervert the benefits intended to be accomplished by provisions of Rule 36(a).' The term 'otherwise improper', therefore, is not a 'catch-all' to encompass objections addressed to the admissibility at the trial of matter contained in the requests, but provides a means for protecting the party called upon to answer, from onerous and unfair requests."

Southern Ry. Co. v. Crosby, 201 F. 2d 878.

" * * * Parties may not avoid the failure to deny matters necessarily within their knowledge by giving any such evasive answer as was given here. The rule requires a sworn statement denying 'specifically' the matters of which an admission is requested or a statement 'setting forth in detail' the reasons why an admission or denial cannot truthfully be given. As said in Barron & Holtzoff, Federal Practice and Procedure, Rules Edition vol. 2 pp. 543, 544: 'A denial in such sworn statement must fairly meet the substance of the requested admission, and when good faith requires that a party deny only partly or with a qualification, a matter as to which an admission is requested, he must specify and admit so much of it as is true and deny only the remainder. The admissions or denials must be forthright, specific, and unqualified. A denial coupled with a general exception of doubtful import, will constitute an admission.' "

V.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN NOT CONSIDERING THE ADMISSION OF COUNSEL FOR DEFENDANTS MADE IN OPEN COURT AND IN HOLDING THAT THE DEFENDANTS OR ANY OF THEM HAVE AUTHORITY TO COLLECT INCOME TAXES UNDER SECTION 31 OF THE ORGANIC ACT, THE UNITED STATES INTERNAL REVENUE CODE OR ANY APPLICABLE LAWS OF GUAM BASED UPON AN ERRONEOUS INTERPRETATION OF I.T. 4046 (Points 9, 10, 11).

The District Court of Guam erred in disregarding the statements and admissions made in open court by counsel for defendants. Such admissions are as much a part of the records and files in the action as are admissions made in the pleadings. They may narrow the issues, eliminate the need for proof, may establish important, contested points.

Mr. Otto and Mr. Rosenberry, Assistant Attorney Generals of Guam made the admission that there is no local statutory authority.

T.R. p. 101:

> "The Court. Now let me ask these questions of the Government of Guam: You have no tax collecting legislation specifically affecting income tax?
>
> Mr. Otto. No legislation by the Government of Guam Legislature specifically directing a department or agency to collect the income tax, as provided under Section 31. However, of course, the money for the Department of Finance which includes the sums necessary to operate the necessary position of the Commissioner of Internal Revenue and other employees.

The Court. The Government of Guam has not specifically enacted any statutory legislation authorizing any particular official to collect income tax. Now that is a fact?

Mr. Rosenberry. Yes, sir.

The Court. The machinery which you are now using to collect the income tax has been set up by administrative order?

Mr. Otto. It has been set up by the Government of Guam by directive from the Governor to the Department of Finance. I wouldn't say there has been an executive order though.

The Court. You have set up this machinery by direction of the Governor, that income taxes shall be collected through those methods and by that agency which collects other taxes?

Mr. Otto. That is correct, your honor."

T.R. p. 102:

"The Court. You do not have any statutory method for taking an appeal from the rulings of the Commissioner of Revenue and Taxation?

Mr. Otto. The Legislature of the Government of Guam has not set up any formal procedure and the Governor of Guam, as head of the executive department, has not established any formal tax court, but for that matter, which is mentioned also in Mr. Crain's affidavit, it may be pointed out that whether or not the United States tax court is available to hear appeals from decisions of the Commissioner of Revenue and Taxation and to assess them is a matter that is a conclusion of law to be decided, presumably, by some court and any statements made by myself, for instance, are mere matters of opinion."

T.R. p. 103:

"The Court. That is what I said at the outset and neither the Legislature nor the Governor of Guam has established a method of appeal from the rulings of the Commissioner of Revenue and Taxation?

Mr. Otto. That is correct, sir, there is no method established whereby the rulings of the Commissioner of Revenue and Taxation could be reversed by an official of the Government of Guam.

The Court. Do you have any procedure for holding that tax in trust until the matter is determined?

Mr. Otto. No such procedure has been established to hold it in trust."

T.R. p. 104:

"Mr. Otto. Well, we don't necessarily deny that. We say that further proceedings in a tax court are possible. We don't know what court."

These admissions are basic and important. They go to the heart of the matter. Namely these defendants have no statutory authority, they have no procedures, they have no system. Their authority stems by implication from a one-sentence section in the Organic Act.

These admissions admit much of the complaint. Surely it was error for the District Court to ignore them.

Basically, however, appellants believe that the major vice of the entire position of the Government is contained within I.T. 4046, pp. 21-23 ante. This pub-

lication, when read in conjunction with the pertinent provisions of the United States Internal Revenue Code set forth on pp. 8-15 ante and of the Organic Act of Guam, pp. 17-21 ante is fantastic.

Yet it is this I.T. published by the Bureau of Internal Revenue that is the Bible for not only the Department of the Interior and the Government of Guam, but also the District Court of Guam. Reading it raises several questions. Studying it brings forth certain conclusions.

First, we may ask the question, "By what right does the Secretary of the Treasury, the Commissioner of Internal Revenue, or any of his subordinates, presume to interpret any portion of Title 48 U.S.C.A.?". By statute, and this can be their only authority, they are restricted to interpreting the Internal Revenue Code, Sec. 4041 T 26 U.S.C.A. p. 15 ante, Sec. 3901 T 26 U.S.C.A. p. 14 ante.

If then we consider the authority of anyone in the Treasury Department in the light of the statutes of the United States, we can only reach one conclusion. They may only interpret and construe those statutes which they have been specifically authorized to, in other words, United States Revenue Statutes. For them to interpret any others is merely to offer a gratuitous opinion of no import. Appellants contend that this is the value of I.T. 4046.

Appellants hold and believe that I.T. 4046, the foundation upon which the entire alleged territorial

tax is built, is void and of no effect. That it is contrary to the express provisions of the statute in question. That the General Counsel of the Bureau of Internal Revenue, or in fact anyone in that bureau, is without authority to interpret any part of Title 48 U.S. C.A. since as they claim they are not charged with administering or enforcing that act.

That when the act is properly viewed the purpose and effect of I.T. 4046 is for the furtherance of interdepartmental policy and contrary to the command of the statute. This I.T., the opinion of an attorney, who has no responsibility in the premises, provides a basis and excuse for the Commissioner of Internal Revenue of the United States to abandon his duties under the Statutes and to illegally delegate them to individuals not authorized to exercise them.

If the Bureau of Internal Revenue has the legal authority to interpret Section 1421i T 48 U.S.C.A. then it also has the responsibility to administer that section. If this is so, the attempted legislation contained in I.T. 4046 is void and the interpretation of that section is in error. If there is no authority to interpret the section, of course the attempt to do so is void. Appellants conclude that in either case I.T. 4046 is null and void and must be disregarded.

Appellants contend that I.T. 4046 must be viewed in this light, that it is at the most the opinion of an attorney. That it has no other force and effect other than that of an office instruction. That it misconstrues the statute it purports to interpret. That it is

an attempt to legislate and to alter and add to a Federal statute, that which Congress has not enacted. That it attempts to delegate, contrary to statute, the duties of the Commissioner of Internal Revenue. That I.T. 4046 is therefore void in its entirety. That the District Court of Guam was in error in accepting the theories advanced in I.T. 4046 and erred in not holding it void. The following cases, appellants believe, fully refute the position of the court and the Government of Guam with respect to I.T. 4046, its meaning and effect.

Crocker v. Lucas, 37 F. 2d 275.

"It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision." Maryland Casualty Co. v. United States, 251 U.S. 342, 349, 40 S.Ct. 155, 157, 64 L.Ed. 297."

Aluminum Co. of America v. United States, 123 F. 2d 615.

"Of course, neither Treasury Regulations nor administrative practice are determinative of the Law. The opinions of general counsel for the Bureau of Internal Revenue upon which the defendant relies for the retroactive enforcement of the new regulation were merely advisory. In no sense did they constitute rules or regulations having the force of statutes."

Jones v. Gaylord Guernsey Farms, 128 F. 2d 1008.

"A regulation promulgated by an administrative body charged with the administration of an act is entitled to great weight, and unless contrary to the legislative intent, ought to be upheld. United States v. Stanolind Crude Oil Co., 10 Cir., 113 F. 2d 194; Nicholas v. Richlow Mfg. Co., 10 Cir., 126 F. 2d 16."

Allis v. LaBudde et al, 128 F. 2d 838.

"Although the Commissioner, with the approval of the Secretary, is authorized to prescribe all needful regulations for the enforcement of Revenue Acts, it needs no argument that he cannot, by such regulations, alter or amend an Act, or limit rights granted by it. Cf. Morril v. Jones, 106 U.S. 466; 1 S.Ct. 423, 27 L.Ed. 267."

Margaret C. Lynch v. Tilden Produce Company, 68 L.Ed. 1034.

"Section 251 of the Revised Statutes confers upon the Secretary of the Treasury authority to make certain rules and regulations, but it grants no power to the Commissioner of Internal Revenue alone. To make any regulation by him on the subject effective, it must be approved by the Secretary, in which event it really becomes a regulation of the latter. Moreover, the rules and regulations authorized by §251 are required to be 'not inconsistent with the law.' The regulation prescribed a standard which Congress has not authorized the Commissioner or the Secretary to fix."

Spreckels v. Commissioner of Internal Revenue, 119 F. 2d 667.

"Incidental to the Commissioner's authority to administer the income tax law is the power to make regulations for the information of the taxpayers, the guidance of the collectors, and the realization of purposes of the taxing acts. Section 62 of certain of the later Revenue Acts (notably, 1934, 48 Stat. 680, 700, 26 U.S.C.A. Int. Rev. Code, sec. 62) furnishes specific authority for the publication of such regulations and under that section was published Regulation 86, relating to the income tax under the Revenue Act of 1934."

Commissioner of Internal Revenue v. Produce Reporter Co., 207 F. 2d 586.

"Although the Commissioner has authority to issue regulations for the enforcement of the revenue laws, such authority does not extend to the establishment of rules of substantive law creating presumptions of fact which are out of harmony with the statute involved."

Van Antwerp v. United States, 92 F. 2d 871.

". . . On March 4, 1929, the Bureau of Internal Revenue issued Ruling I.T. 2457, which recited the change in the California law, and stated: . . . Such I.T. rulings have 'none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law.' Ambassador Co. v. Commissioner (C.C.A. 9) 81 F. 2d 474, 481. . . . Further, since this I.T. ruling is not a 'Regulation' or even a 'Treasury Decision', it does not have the quality

of a law of which the taxpayer is charged with knowledge."

Commissioner of Internal Revenue v. Betts, 123 F. 2d 534.

"If the regulations go beyond the statute they are void. The scope of Congressional enactment cannot be enlarged by a departmental regulation."

Combs v. United States, 98 F. Supp. 749.

"It is, of course, basic that the Congress may not delegate to administrative offices the legislative powers vested in it. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 529 530, 55 S.Ct. 837, 79 L.Ed. 1570. It is the nature of the power which determines whether the delegation is legal. Panama Refining Co. v. Ryan, 293 U.S. 388, 420, 55 S.Ct. 241, 79 L.Ed. 446. A good distinction is that when the Congress makes a delegation of its legislative powers, it gives some administrative officer a discretion to say what the law shall be. This it may not do, but it can confer on such administrative authority discretion as to how the law having been established by Congress is to be executed."

United States v. Bennett (Two Cases), 186 F. 2d 407.

"On the basis of these rulings of the Income Tax Unit of the Bureau, made to order for the commissioner by his legal staff, and having no more binding or legal force than the opinion of any other lawyer, the collector claims: that the statute though intended as a relief measure, does

not relieve these taxpayers; that this is so simply because it is known at the time the calf is dropped that, whether it goes to market as a calf or as a worn out breeder, to market it will go."

Busey v. Deshler Hotel Co., 130 F. 2d 187.

". . . To become binding, interpretative regulations must be reasonable and in furtherance of the intention of Congress, as evidenced by its Acts. An arbitrary regulation of the Commissioner of Internal Revenue is not enforceable. Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute. See Iselin v. United States, 270 U.S. 245, 250, 46 S.Ct. 248, 70 L.Ed. 566."

Clicquot Club v. United States, 13 F. 2d 655.

"The Revenue Act of 1918 (section 1309 (Comp. St. Ann. Supp. 1919, § 6371½i)) gave to the Commissioner of Internal Revenue authority 'to make all needful rules and regulations for the enforcement of the provisions of this act,' but I take it this authority does not extend so far as to permit the Commissioner, by regulations or rulings, to increase the measure of the tax imposed by section 628 on manufacturers of beverage merely because the taxpayer had failed to comply with the strict letter of the regulation or ruling. The regulations must be kept within the law. Waite v. Macy, 246 U.S. 606, 38 S.Ct. 395, 62 L.Ed. 892. The administrative officers may not by regulations enlarge or abridge the obligations im-

posed by the statute. To exercise such power is to legislate, and not to regulate. U.S. v. United Verde Copper Co., 196 U.S. 206, 25 S.Ct. 222, 49 L.Ed. 449; International Ry. Co. v. Davidson, 257 U.S. 506, 42 S.Ct. 179, 66 L.Ed. 341. Statutes imposing taxes are not to be extended by implication. U.S. v. Merrian, 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240, 29 A.L.R. 1547. A fortiori such statutes cannot be extended by regulation."

Appellants hold that not only is the entire basic premise invalid, but that it is impossible, by the opinion of one attorney, to construct an entire system of taxation reading into the United States statutes and the Statutes of Guam that which neither the Congress nor the legislature saw fit to put there. Pertinent portions of the Statutes of Guam are found at pp. 20-21 ante.

VI.

THE COURT ERRED IN HOLDING THAT THE DEFENDANTS WERE SUED IN THEIR OFFICIAL CAPACITIES (Point 12).

The fact that an individual holds public office does not of itself cloak every act of that individual with his official capacity. Does sovereign immunity extend so far that it is a shield to every government officer or employee who may wish to shield behind it every wrongful, illegal, arbitrary, void or other act of his which is contrary to law, in excess of his authority, without authority, or is actually illegal?

Appellants hold that such is not the case. While admitting that acts within the scope of lawful au-

thority are protected, appellants believe that all other acts are on a par with the acts of any private person, standing or falling upon their own merits and not by the aid of a legal fiction.

Nakasheff v. Continental Ins. Co., 89 F.Supp. 87.

"... Judge Learned Hand in Sims v. Stuart et al, D.C.S.D.N.Y., 291 F.707, in dealing with the status of a Collector of Customs observed: 'He is not even accountable for such illegal acts as an official, but individually. Smietanka v. Indiana Steel Co., 257 U.S. 1, 42 S.Ct. 1, 66 L.Ed. 99. If he has committed a trespass, he is subject to the same law as though he held no office, but to no different remedies, except as some statute provides it. He should have no protection from his possession, but he should suffer no added liability.' Later, Judge Augustus N. Hand in Conklin et al v. Newton, 2 Cir., 34 F.2d 612, 614 observed, in a suit against a defendant personally (who was at the time Collector of the Port of New York): 'Without some exoneration by statute, the collector, though a public official, is personally liable for unwarranted acts. Thus collectors have been held individually responsible for taxes unlawfully collected.' "

Farrell et al v. Moomau et al, 85 F.Supp. 125.

"The contention of the defendants that this suit is a suit against the United States, which has not consented to be sued, cannot be sustained. It has generally been held that the United States is not an indispensable party where, although the official acts under a valid statute, he actually ex-

ceeded the authority with which the statute invested him. Work v. Louisiana, 269 U.S. 250, 46 S.Ct. 92, 70 L.Ed. 259; Payne v. Central Pac. Ry. Co., 255 U.S. 228, 41 S.Ct. 314, 65 L.Ed. 598; Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570."

Mine Safety Appliance Company v. Forrestal, 90 L.Ed. 140.

". . . For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations including the one that the Renegotiation Act is unconstitutional are true, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference. These cases hold that a public officer can not justify a trespass against a person's property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered as indispensable party."

Lawrence Yearsley v. W. A. Ross Construction Co., 84 L.Ed. 554.

"Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. Philadelphia Co. v. Stimson, 223 U.S. 605, 619, 620, 56 L.Ed. 570,

576, 577, 32 S.Ct. 340. See United States v. Lee, 106 U.S. 196, 220, 221, 27 L.Ed. 171, 181, 182, 1 S.Ct. 240; Noble v. Union River Logging R. Co. 147 U.S. 165, 171, 172, 37 L.Ed. 123, 125, 126, 13 S.Ct. 271; Tindal v. Wesley, 167 U.S. 204, 222, 42 L.Ed. 137, 143, 17 S.Ct. 770; Scranton v. Wheeler, 179 U.S. 141, 152, 45 L.Ed. 126, 133, 21 S.Ct. 48; American School v. McAnnulty, 187 U.S. 94, 108, 110, 47 L.Ed. 90, 96, 97, 23 S.Ct. 33."

United States of America, Appellant, v. Alice Gray Kales, 86 L.Ed. 133.

". . . As Congress had enacted provisions for indemnification of the collector by the Government, the implication necessarily arose that the taxpayer could maintain an action against him. See (July 1, 1862) 12 Stat. at L. 432, 434, Chap. 119; (March 3, 1863) 12 Stat. at L. 713, 729, Chap. 74; (March 3, 1863) 12 Stat. at L. 741, Chap. 76; (June 30, 1864) 13 Stat. at L. 223, 239, Chap. 173.

"The right of action thus continued is identical with that which existed before Congress had acted. Notwithstanding the provision for indemnifying the collector and protecting him from execution, the nature and extent of the right asserted and the measure of the recovery remain the same. It was payment to the collector which gave rise to the suit against him and limited the amount of the recovery. The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. See Sage v. United States, 250 U.S. 33, 63 L.ed. 828, 39 S. Ct. 415, supra; Smietanks v. Indi-

ana Steel Co., supra (257 U.S. 4, 5, 66 L.ed. 100, 101, 42 S. Ct. 1)."

Clearly herein the defendants are not being sued in their official capacities nor for their official acts, but rather for illegal, arbitrary acts performed by virtue of their official positions and authority or right. The relief sought is against these defendants as individuals. They are for ease of identification set forth in the complaint by title.

Appellants contend the court was in error and that it should be reversed with instructions to receive evidence and enter judgment against defendants as individuals.

VII.

THE COURT WAS IN ERROR IN ITS CONSTRUCTION OF THE ORGANIC ACT OF GUAM AND IN ITS INTERPRETATION OF THE LAGUANA CASE (Points 13, 14).

This court may take judicial notice of the terms of the Organic Act of Guam. The pertinent provisions of which are set forth for convenience pp. 17-19 ante.

This act is a statute of the United States and should be construed in accordance with the canons for the construction of United States laws as formulated by the courts of the United States.

The primary canon is so elemental that to many it would not at first glance appear to be a canon. Let us take the text of the statute, read it and see what it says. If it is clear, unambiguous, does not lead to

absurdity and on its face provides a workable enactment, there is no room for nor need to construe. Construction is not the end in view, it is to be resorted to when necessary, not automatically.

Lindstrom v. Commissioner of Internal Revenue, 149 F.2d 344.

". . . The will of Congress has been plainly expressed in language that does not permit or require a strained or unnatural interpretation. The words of the statute may not be extended or distorted beyond their plain, popular meaning. See Helvering v. Hammel, 311 U.S. 504, 61 S. Ct. 368, 85 L.Ed. 303, 131 A.L.R. 1481; Woolford Realty Co. v. Rose, 286 U.S. 319, 52 S.Ct. 568, 76 L.Ed. 1128."

McCarthy v. M & M Transp. Co., 160 F.2d 322.

". . . Here we are asked to determine what Congress meant when it used the words in Sec. 8(b) 'in the case of any such person who, in order to perform such training or service, has left or leaves a position * * *.' The language of the Act is clear and unambiguous. 'The first resort in ascertaining the legislative intent is to give words used in a statute their natural, ordinary and familiar meaning and that meaning will be applied unless Congress has definitely indicated the words in the statute should be construed otherwise. The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction.' Western & Southern Life Ins. Co. v. Huwe, 6 Cir., 1941, 116 F.2d 1008, 1009."

Mabel G. Reinecke v. Frank G. Gardner, 72 L.ed. 866.

"But whatever purpose Congress may have had, we think the language of Sec. 212 falls short of indicating any intention to enlarge the classes of taxpayers mentioned in title II. The extension of a tax by implication is not favored. United States v. Whitridge, and Smietanka v. First Trust & Sav. Bank, supra."

Helvering v. Stockholms Enskilda Bank, 79 L. ed. 211.

"In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts 'are not to be extended by implication beyond the clear import of the language used', and that doubts are to be resolved against the government and in favor of the taxpayer."

Brown v. Magruder, 25 F.Supp. 161.

"This court in construing a statute cannot be controlled by results, whether they be favorable or unfavorable to either party to the controversy, including, of course, the Government. The tax desires or needs of the Government are to be given no heed by this court unless it is clear they are being satisfied in legitimate ways."

Helvering v. New York Trust Co., 78 L.Ed. 1361.

"The rule that where the statute contains no ambiguity, it must be taken literally and given effect

according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose."

Santa Monica Mountain Park Co. v. United States, 99 F.2d 450.

"It is fundamental that the province of construction of statutes lies wholly within the domain of ambiguity. The rules of construction are an aid to resolve doubts and not to create them. Ruggles v. Illinois, 1883, 108 U.S. 527, 2 S. Ct. 832, 27 L. Ed. 812; Wisconsin R.R. Comm. v. Chicago, B. & Q. R. R. Co., 1922, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086; Riverdale Co-operative Creamery Ass'n v. Commissioner, 9 Cir., 1931, 48 F.2d 711."

Applying those canons, is construction necessary or in fact permissible with respect to the tax provisions of the Organic Act of Guam?

Appellants contend that if the pertinent provisions of the Organic Act of Guam are properly viewed, there is spelled out, clearly, without ambiguity the plain intent of Congress, that it is a practical, workable system and does not require either judicial or executive legislation to make it effective. That if properly interpreted and applied it avoids all the pitfalls and objections otherwise presented, in fact avoids the Constitutional objections presently raised against the Act as now construed and applied.

Reading Section 1421; T 48 U.S.C.A. what do we derive from the plain, simple, everyday language there

used. The present income tax laws of the United States and those in the future will be in effect within Guam. Does that mean anything else than what it says? Appellants claim it does not. They base their contention upon the old and well founded rule that when a statute is thus incorporated by reference it is carried over in toto. Is there anything illogical about this?

Now assuming that this section has within itself the text of the income tax laws of the United States, is not our next step in logic to look at the income tax laws of the United States to see what they say? Will they as a practical matter work thus incorporated? Are there any ambiguities?

They provide, we discover, a complete system of income taxation. They provide for collection, assessment, full means of enforcement and they clearly specify who has the authority and duty to administer, collect, assess and interpret. Is there any lack of clarity here? In what way will not the United States Internal Revenue Code function as written and under the supervision of the named officials of the United States? Do we not therefore have, if we take the plain meaning of the words of Section 1421; a system of taxation which presents no difficulties, which needs no construction, and which is clearly in conformity with the plain command of the statute? Appellants so contend and believe.

Reading Section 1421 h of Title 48 U.S.C.A. and applying the same yardstick, we discover that this is not a tax section; it is merely a quasi-appropriations

act. It grants to the Government of Guam all of certain Federal taxes and other receipts. This section clearly has no bearing upon the collection, administration or enforcement of any tax; it is a pure gift section, giving funds from the Treasury. We may pass it by.

Thus appellants contend and properly, we believe, that there is no need for applying any canons of construction to Section 1421; it is clear and provides the entire method and authority for its implementation and the District Court of Guam misconstrued its meaning. The District Court of Guam was not warranted in construing this section since it is plain and to do so was to judicially legislate. The executive branch of the Government of Guam has likewise misconstrued this section and is attempting to create a taxing system by implication and by executive legislation. Neither proper, warranted by the facts, nor is it necessary. The court was in error in holding that this section meant anything other than what the plain words say.

The court also misconstrued the *Laguana* case, 102 F.Supp. 919. It is apparent at once, when this case is read, that it did not and could not cover or contain the various rulings cited by the court. This case was decided upon one point; all else it is claimed, is dicta. Did the complaint state a claim upon which relief could be granted? The court holding that it did not dismissed the complaint. All facts were stipulated including many of the controverted facts in this case. Surely the court must be held to have misconstrued

the various dicta as authoritative when in fact not so. Can anything contained in a case not necessary to the decision be other than dicta and is dicta ruling? Appellants contend not.

VIII.

THE COURT WAS IN ERROR IN HOLDING THAT APPLICABLE PROVISIONS OF THE UNITED STATES INTERNAL REVENUE CODE ARE INCOME TAX LAWS WITHIN THE MEANING OF SECTION 31 OF THE ORGANIC ACT OF GUAM (1421i T 48 U.S.C.A.) SUBJECT TO NON-SUBSTANTIVE CHANGES IN NOMENCLATURE (Point 15).

The plain meaning of this section is as clear as if after the end was reproduced in its entirety so much of Title 26 U.S.C.A. as pertains to income tax. The canons of statutory construction hold this; so also does the often forgotten rule of reason.

Now, therefore, what purpose will it serve to make "non-substantive changes in nomenclature"? Where is the authority or need for any change? We know of none.

Further, what is non-substantive, what does change of nomenclature mean? If this is so, who is to change it? What standards are there for these changes? How far may they go? Where has there been any delegation of any authority to anyone to make these changes and who has the power to decide when they are necessary? It would seem to appellants that this holding of the District Court is both a legal as well as a logical absurdity.

The statute says the United States income tax laws —just that, no more, no less. If they are altered, changed or re-written, they are not the United States income tax laws, but some other, possibly similar, laws. But in such event, they violate the statute, i.e., Chap. 8A, Title 48 U.S.C.A. They are now, when changed, different laws.

The statute does not say the income tax laws of Guam; it says the United States. To change or alter these statutes by one word is to exercise legislative power and functions. This is forbidden by the Constitution to not only the executive but to the courts. Such a power cannot be granted or delegated by the Congress to anyone.

> *Federal Trade Commission v. Raladam Company,* 75 L.Ed. 1324.
>
> "Official Powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

> *Hawke v. Commissioner of Internal Revenue,* 109 F.2d 946.
>
> "Nor do we agree to this suggestion. Departmental regulations may not invade the field of legislation, but must be confined within the limits of congressional enactment. Commissioner v. Van Vorst, 9 Cir., 1932, 59 F.2d 677, 679, and cases cited therein."

Opp. Cotton Mills, Inc. v. Administrator of the Wage and Hour Division of the Department of Labor, 85 L.Ed. 624.

"The mandate of the Constitution that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as factfinding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitute the performance, in the constitution sense, of the legislation function.

"But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specified the basic conclusion of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

However, is there not a reason for everything. Is there not a compelling reason for the court and the Government of Guam to attempt to substantiate such a premise. The United States Income Tax Laws provide not only the rate of tax, the method for administration, all procedures including appellate and also spell out in detail who has the authority and how such authority shall be exercised.

If the clear command of the statute is obeyed, we then have the Income Tax Laws of the United States administered by the same United States officials, in accordance with the standards and rules long established in use elsewhere and there is no room for local interpretation or alteration.

If a local tax can be read into the plain words of the statute, then local officials have, they assert, the authority to interpret and enforce it according to their own notions. They will not have to provide all the steps and procedures contained in the United States statute. Anything may be omitted as nomenclature.

This fact was admitted by Mr. Otto at the hearing on the motion when he said there are no appellate procedures, no review is possible, no tax court. Yet all of this presumably is minor changes in nomenclature.

Clearly the court erred in holding that administrative officers or anyone else but the United States Congress can alter, amend or change a statute of the United States. To do so is neither administrative action or minor. It is legislation and void.

IX.

THE COURT ERRED IN FAILING TO RECOGNIZE THE EXISTENCE OF SERIOUS QUESTIONS INVOLVING CONSTITUTIONAL LAW, THE APPLICATION OF THE BILL OF RIGHTS FOR GUAM, AND OF STATUTORY CONSTRUCTION (Point 16).

The court fell into error and closed its mind to the existence of numerous grave questions raised in this case; among them appellants briefly indicate a few:

First and foremost, the court refused to recognize the question of the unconstitutional delegation or exercise of the legislative powers reserved to the Congress.

Second, the court failed to see that the question of due process of law enters into this case at all.

Third, the court was unaware of any possibility of the Section in question violating the constitutional mandate against vagueness and lack of standards. The court refused to consider any possibility of the illegal imposition of a tax by implication and the void addition to an act of Congress by any action except that of the Congress.

The court refused to notice the enforcement of withholding contrary to the terms of the United States statutes.

The court refused to see the attempted enforcement of a Federal Statute and the use of remedies exclusively reserved to the United States by unauthorized persons and contrary to the provisions of Title 26 U.S.C.A.

The court failed to notice the effective deprival of the equal protection of the laws alleged in the complaint.

The court cannot see any violation of the Federal Civil Rights Laws under claim of territorial authority and under and by virtue of the color of office by these defendants.

Appellants contend that all these enumerated important questions are clearly set forth in their complaint, that at the argument upon the motion and by the files in the action all were called to the attention of the court and that the court, ignoring their existence, was in error.

X.

THE COURT ERRED IN FAILING TO COMPLY WITH THE MANDATORY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE AND IN FAILING TO REQUIRE COMPLIANCE BY THE DEFENDANTS WITH THE SAME MANDATORY RULES (Point 17).

One rule ignored by the court is Rule 15(a) which provides that at any time before a responsive pleading is served, any party may amend once as a matter of course. A motion is not a responsive pleading, yet appellants were denied the right to amend. T.R. p. 104.

> "Mr. Phelan. We could add an amendment to this complaint.
>
> The Court. I have to take this complaint as it is. I have a motion for summary judgment before me. I have got your motion for summary judgment. You are through on this complaint."

Appellants contend this was error and deprived them of a substantial right.

The court did not heed the requirements of either Rule 36 or Rule 56 and did not require compliance by the defendants with the same rules.

The court accepted defendant Kennedy's answer to the request for admission which contrary to Rule 36 was signed and verified by defendant Taitano.

The court failed to require defendants to make proper objections to the requests for admissions and permitted them to be evasive and deliberately flaunt the spirit of the rule.

The court refused to give heed to the requests for admission treating every matter adduced or presented by appellants as set forth on page 85 of the transcript as window dressing. In effect, you are wasting your time. This matter does not require anyone to adhere to the rules.

Appellant contends that the total and consistent disregard of the Civil Rules was not only error but deprived the appellants of their constitutional right to a fair hearing, and because of this error the judgment should be reversed.

CONCLUSION.

Appellants believe that the District Court of Guam was in numerous instances in error in this action, are of the opinion that various ones have been pointed out in this brief, and that these errors require reversal. Not wishing to belabor the points, and a wealth of error leads to confusion, appellants are

convinced that the errors herein are most clearly apparent from consideration of the transcript of the proceedings.

Appellants conclude that the judgment of the District Court of Guam should be reversed, that the defendants be required to answer the complaint, and that the action should proceed to a trial.

Dated, Agana, unincorporated territory of Guam,
28 March 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,
Attorney for Appellants.